IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 15TH FEBRUARY 2007 / 26TH MAGHA 1928

RSA.No. 270 of 2006(F)

AGAINST COMMON JUDGMENT DATED 11.7.05 IN APPEAL NO,.234/03 ON THE FILES OF DISTRICT JUDGE'S COURT, KOTTAYM ARISING FROM JUDGMENT AND DECREE DATED 19.7.03 IN O.S.2/03 ON THE FILE OF SUB COURT, PALA

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APPELLANT/APPELLANT/PLAINTIFF

ABDUL MUTHALIB, S/O.MUHAMMED,
AGED 60 YEARS, KOLEZATHKANIMEL HOUSE,
NADACKAL KARA, TEEKOY VILLAGE, MEENACHIL TALUK.

BY ADV. SRI.K.S.HARIHARAPUTHRAN
SRI.M.D.SASIKUMARAN
SRI.P.J.JOSEPH
SRI.GEORGE MATHEW
SRI.VIJO JOSE

RESPONDENTS/RESPONDENTS/ DEFENDANTS

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1. ABEY JOSEPH, S/O.K.A.JOSEPH,
KANDATHIL HOUSE, ANIKAD KARA,
ANIKAD VILLAGE, KOTTAYAM TALUK.

2. SIBY JOSEPH, S/O.K.A.JOSEPH,
KANDATHIL HOUSE, ANIKAD KARA,
ANIKAD VILLAGE, KOTTAYAM TALUK.

3. CHINNAMMA JOSEPH, W/O.K.A.JOSEPH,
KANDATHIL HOUSE, ANIKKADU KARA,
ANICKADU VILLAGE, KOTTAYAM TALUK.

BY ADV. SRI.JOY GEORGE
SMT.PRAICY JOSEPH
SMT.ANU VENU

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 15/02/2007, ALONG WITH FAO NO. 269 OF 2005 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

R.S.A.NO.270/06 &
F.A.O.269 OF 2005

DATED THIS THE 15th DAY OF FEBRUARY, 2007

JUDGMENT

Defendants in O.S.2/03 on the file of Sub Court, Pala are appellants in F.A.O.269/05 and respondents in R.S.A.270/06. Plaintiff in O.S.2/03 is the appellant in R.S.A.270/06 and respondent in F.A.O.269/05. That suit was filed seeking a decree for declaration of right of easement over Item No.3 of plaint schedule road and for a permanent prohibitory injunction restraining appellants from obstructing the use of road. The case of respondent was that item No.1 of plaint schedule property belonged to him as he purchased the same under Ext.A1 sale deed in 1982 and item No.3 is the only way available to the said property and he has a right of easement by prescription as well as right of easement by necessity. Appellants filed a written statement disputing the claim contending that there is no road through their property to item No.1 of plaint schedule property and respondent has no right of easement by necessity or prescription through their property and therefore the suit is to be dismissed.

2. First appellant in turn as sole plaintiff filed O.S.82/01 seeking a decree for permanent prohibitory injunction restraining

respondent as sole defendant from trespassing into his property alleging that respondent has no right to use any portion of his property. Learned Sub Judge framed necessary issues and tried the suits jointly. On the evidence PW1 to 8 and Dws 1 to 3 and exhibits A1 to A11, B1 to B5 and C1 to C2(a) dismissed O.S.2/03 holding that respondent failed to establish either a right of easement by prescription or right of easement by necessity. Consequently O.S.82/01 was decreed restraining respondent from cutting open a new road through plaint schedule property or taking vehicle through the said property. Respondent challenged the decree and judgment in A.S.234/03 and A.S.235/03. Former was filed challenging the dismissal of O.S.2/03 and latter challenging the decree granted in O.S.82/01.

3. Learned District Judge on re-appreciation of evidence confirmed the finding of learned Sub Judge that respondent has not established a right of way by easement of prescription. But on the question of easement by necessity, learned District Judge found that item No.1 of plaint schedule properties and item No.2 of plaint schedule properties which lies to the south and the property to the west of item No.1 of plaint schedule properties originally belonged to one and the same family and thereafter by severance of tenement plaint schedule item No.1 property vested in respondent and the remaining properties on appellant and this was not properly

considered by learned Sub Judge. After receiving the documents produced by appellant, filed along with an application at the appellate stage, after satisfying the provisions contained in Rule 27 of Order XLI of Code of Civil Procedure, learned District Judge held that by producing the documents alone, the disputed questions cannot be resolved and therefore the question whether by severance of tenement respondent has a right of easement by necessity has to be considered by learned Sub judge. Therefore O.S.2/03 was remanded to Sub Court for fresh disposal. It is challenging the said order of remand, FAO 269/05 was filed. Challenging the confirmation of the finding of learned Sub Judge that respondent is not entitled to a right of easement by prescription, plaintiff/respondent filed R.S.A.270/06.

4. Learned Counsel appearing for appellant and respondents were heard.

5. Learned District Judge confirmed the finding of learned Sub Judge on the right of easement by prescription claimed by respondent. It was only under Ext.A1 respondent obtained right and possession over item No.1 of plaint schedule property only on 19-4-1982. O.S.2/03 was originally instituted before Munsiff Court Erttupetta as O.S.127/01 on 3.12.01. The suit was thus instituted before the expiry of twenty years from the date of Ext.A1. By his use of the alleged way from the date of Ext.A1, respondent/plaintiff

cannot prescribe a right of way by easement of prescription. His predecessor, the executant of Ext.A1 was not examined. Courts below found that therefore there is no evidence to prove that the alleged road was being used by respondent or her predecessor for the requisite number of years and that too as of right and as an easement openly peaceably and without obstruction and respondent is not entitled to a right of easement by prescription. Though it was challenged in R.S.A270/06, I find no substantial question of law involved in the appeal in the light of admitted facts and evidence. The factual finding rendered by trial Court and first appellate Court concurrently cannot be interfered. R.S.A.270/03 is only to be dismissed.

6. Arguments of learned Counsel appearing for appellants in F.A.O.269/05 was that learned Sub Judge elaborately considered the evidence and found that respondent is not entitled to a right of easement by necessity and learned District Judge in such circumstances should not have remanded the case back to the trial Court. It was argued that reason for remand was admission of additional evidence,by allowing the application to receive documents by the learned District Judge and additional evidence should not have been received at all and therefore on that ground the order of remand is to be set aside. It was also argued that on the fact an order of remand is only an exercise in futility in view of the fact that

the disputed road further runs towards the west through the joint property of appellants and others and no right was claimed through that property. It was also argued that when report of the Commissioner shows that there is a way to item No.1 of plaint schedule properties, to its east and runs towards the north and in the light of the evidence to prove that there is no alternate way available to item No.1 of plaint schedule property, interest of justice does not warrant an order of remand.

7. Learned Counsel appearing for respondent argued that the documents could not have been produced before trial Court and its reasons have been explained in the application and it was only after getting satisfied learned District Judge allowed the application and there is no reason to interfere with that finding. It was also argued that the alternate way suggested by appellants was considered by learned District Judge and it was found that, that way ends in a thodu on the north and that water channel cannot be an alternate way available to respondent to deny the right of easement by necessity and there is no reason to interfere with the order of remand.

8. Learned District Judge has given sufficient and cogent reasons for receiving additional evidence to invoke the powers provided under Rule 27 Order XLI of Code of Civil Procedure. Even if it is taken that a party, failed to produce the documents before

the trial Court and with due diligence it could have been produced before the trial Court and the documents are produced at the appellate stage. If appellate court finds that the said documents are necessary to pronounce a better judgment, even if that party did not establish that with due diligence, the documents could not be produced, still appellate Court is competent to receive the same in exercise of the power under Rule 27 of Order XLI to pronounce a better judgment. Learned District Judge found that the documents are necessary to pronounce a better judgment. Therefore the order of learned District Judge receiving the documents as additional evidence cannot be challenged.

9. After rejecting the claim of respondent for a right of way by easement of prescription, learned District Judge found that the property belonging to appellants and purchased by respondent under Ext.A1 originally belonged to the same family. Learned District Judge also found that the documents produced at the appellate stage shows that the properties were severed. Learned District Judge therefore held:

> "Only if it is established that there was unity of interest and subsequently there was severance of tenements the appellants could succeed on a claim of easement of necessity. Therefore the documents now produced by the appellant in the

appellate court are absolutely essential for an effective adjudication of the question involved. Mere production of the documents will not be sufficient to establish that there was severance of tenements and the property belonged to one and the same family. The documents are to be proved by examining the persons who are competent to prove it. Similarly the appellant has to establish that in the Njallampuzha family there was a partition and subsequent to that partition the transfers have taken effect. So also it is to be proved by the appellant that at the time of the partition of the family property, the pathway viz. The old foot path was in existence and that has been set part for the enjoyment of the various sharers. Only if it is established that there was an apparent or continuous easement existed at the time of partition or transfer the appellant could succeed. Since such evidence is lacking in this case it appears to me that for an effective adjudication of the dispute the matter is to be sent back to the subordinate court to unable the parties to adduce evidence on this aspect alone.

A remand of the suit to decide this question has become essential under this circumstances."

10. In the light of this finding, the power exercised by learned District Judge to remand the case cannot be termed illegal. Even if arguments of learned Counsel appearing for appellants is accepted and that respondent did not seek a relief in respect of the existing road, which lies further towards north and joints Anayilappu Njandukal PWD road, so long as respondent has no case that there is any obstruction to the usage of that road, there is no necessity to seek a decree in this suit in respect of that portion of the road. Hence failure to seek a decree in respect of that property by itself is not a ground to hold that the order of remand is unjustified or unwarranted. I find no substantial question of law involved in F.A.O.269/05 also. F.A.O. is also to be dismissed.

R.S.A.270/06 and F.A.O.269/05 are dismissed in limine. Learned Sub Judge is directed to dispose the suit as expeditiously as possible.

M.SASIDHARAN NAMBIAR,JUDGE

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